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No. 87-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,

Petitioners,

v.

GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision that the Petitioners, a class of candidates and voters, lacked standing to challenge hiring practices, is consistent and in accord with this Court's decisions requiring a plaintiff to demonstrate injury fairly traceable to defendants.

2. Whether there is any basis for review of the merits, where the Court of Appeals did not reach the question of the constitutionality of the challenged hiring practices, and the alleged importance of the issue therefore no more serves as a reason to grant the writ than it confers standing.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is argumentative, and Respondents[1] offer the following to correct material inaccuracies and omissions. The Court of Appeals decision contains a detailed history of the case. (1a-11a)

[1] Respondents to the instant petition, Defendants-Appellants in the Court of Appeals, are George W. Dunne, President of the Cook County Board of Commissioners; Stanley T. Kusper, Jr., County

(Footnote continued on following page)

Petitioners were certified as a class of candidates and voters in Cook County, Illinois. The district court held that Petitioners have no standing, as candidates and voters, to assert any rights of employees or of job applicants. (61a, 63a) The Court of Appeals held that they further have no standing, as candidates and voters, to challenge hiring practices of Respondents.

Petitioners' Statement of the Case discusses the situation alleged at the time the complaint was filed in 1969. That situation was not before the Court of Appeals for its 1987 decision:

> The case before us today is, from a *factual* viewpoint, a very different case from that set forth in the complaint. The consent decree with respect to politically-motivated discharges . . . has eliminated a significant portion of the contentions . . . originally presented. (11a) [emphasis the Court's]

The Court further found that:

> The combined impact of political hiring and firing practices—a significant part of the plaintiffs' original case—is therefore not before us on this appeal. (12a)

Thus, Petitioners' references to harm from some "massive political effort", and to a "massive" or "extensive patronage hiring system" (Pet. *i.e.*, at 5, 6, 8), to coercion or to requirements for keeping jobs (Pet. at 4), are

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[1] *continued*
Clerk of Cook County; Thomas C. Hynes, Assessor of Cook County; the Cook County Forest Preserve District; and the Democratic County Central Committee of Cook County. These parties, who were defendants in the District Court, appealed the judgment as to hiring practices. Other defendants, officials of Cook County and of Chicago, did not appeal, but entered into consent judgments regarding hiring practices. The Democratic County Central Committee of Cook County is not a party to this Brief in Opposition.

references to the allegations at the inception of this litigation, to allegations in the Complaint which the Court of Appeals found no longer to be at issue. Petitioners' example of the alleged substantial effect of patronage practices is Mr. Shakman's own election loss, in 1969.[2] (Pet. at 5)

As the Court of Appeals found, those practices have been substantially and significantly modified by the earlier consent decrees. The Respondents, as well as the defendant officials who did not appeal the hiring judgment, had all entered into a consent judgment (121a-127a) in which they agreed that they were prohibited from

> "conditioning, basing, or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor." (5a)

Therefore, any hiring done, with or without political considerations, is hiring to fill vacancies, because current employees cannot be discharged, or otherwise subjected to adverse action, based upon political considerations.

The earlier decision of the Court of Appeals, in 1972, had relied for its finding of standing upon allegations of:

> the misuse of official power over public employees so as to create a substantial, perhaps massive, effort in favor of the ins and against the outs. (39a)

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[2] Petitioners attempt to attribute Mr. Shakman's defeat to patronage. The record establishes that Mr. Shakman was one of four candidates running for two seats to the Illinois Constitutional Convention. Mr. Shakman was the only white candidate in a predominantly black district. The other independent candidate received the largest number of votes, while Mr. Shakman, who placed third, received more votes than one of the "regular Democratic" candidates.

This holding was prior to the consent decrees, and referred explicitly to coercion of employees. The Court in 1972 warned that:

> care will be required to distinguish between compelled and voluntary political support by public employees. (40a)

In the opinion which is the subject of the instant petition, the Court of Appeals relied for its finding that Petitioners lack standing upon the changed factual context, in that any work done by employees is voluntary, not coerced.[3] The Court of Appeals found to be "particularly attenuated" the plaintiffs' claims that their rights as candidates and voters were infringed because persons who might want to seek government employment might be reluctant to support candidates not yet elected to office. (20a) The Court stated that many factors influence political activity, and pointed out that incumbency has both advantages and disadvantages. (20a-21a) In addition, any candidates, once elected, may offer vacant jobs to supporters. (20a)

This case was decided in the district court on cross-motions for summary judgment. Defendants had offered several affidavits of local political science professors and other experts, that political hiring practices have no significant effect on the outcome of elections. Plaintiffs offered several affidavits of other professors and of candidates reaching the opposite conclusion.

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[3] The Court expressly stated that it was not deciding whether plaintiffs would have standing to challenge coerced political work by those already employed. (23a, n. 14)

The summary judgment filings showed that at the time, there were approximately 20,000 positions to which, if they were vacant, the challenged hiring practices might be applicable. This number includes both the City of Chicago and Chicago Park District, as well as the Cook County defendants. At the time the summary judgment motions and supporting evidence were filed, those entities employed about 58,000 employees, or 118,000, if the Chicago Board of Education and Chicago Transit Authority (as it was then called) were included.

Petitioners incorrectly state that "persons who in any way openly support independent candidates are excluded from these jobs." (Pet. at 7) The district court's opinion, cited by Petitioners, refers to "usually" or "normally" and does not refer to "any . . . open" support. (55a) No defendant admitted "needing" politically based hiring to obtain campaign workers to win elections. (Pet. at 7) Defendants did admit that one purpose of giving hiring preferences is to try to help win elections. The Court of Appeals noted that this states the obvious, but that job seekers may react in any number of ways to numerous factors, including their assessments of the campaign. (20a-21a)

The district court's decision, according to Petitioners, was based on use by "the State" of "coercive power." (Pet. at 9) The Court of Appeals found that coercion was no longer at issue (11a-12a), and that Petitioners cannot fairly trace any injury to Respondents' hiring practices. (20a-25a) The Court of Appeals denied Petitioners' Motion to Stay the Mandate, on October 27, 1987.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DECISION THAT PETITIONERS HAVE NO STANDING TO CHALLENGE HIRING PRACTICES IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

Once Petitioners finally address the question of standing, they erroneously base their claim on the allegations of the complaint, which as the Court of Appeals found, have been substantially eliminated as a result of the 1972 consent decree barring politically motivated coercion or other adverse action affecting incumbent employees. Petitioners' entire argument begs the question by assuming the substantial impact which they alleged in 1969, but which no longer exists.

The Court of Appeals found that in light of the changed factual nature of this litigation as a result of the early consent judgment, as well as this Court's modification or clarification of the standing requirement, the Petitioners, who are candidates and voters, have no standing to challenge hiring practices. Petitioners' "particularly attenuated" claims depend upon speculation as well as countless independent factors. They therefore cannot establish any injury fairly traceable to the practices challenged, and cannot assert a case or controversy as required by Article III, §2 of the United States Constitution. This holding of the Court of Appeals is absolutely consistent and in accord with this Court's decisions on standing.

The Court of Appeals relied upon decisions of this Court for the elements of standing analysis, quoting from *Allen v. Wright*, 468 U.S. 737, 751 (1984):

> A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be addressed by the required relief. (14a)

The Court of Appeals also referred to *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), and a number of earlier decisions of this Court. (14a)

Following other aspects of this Court's analyses, the Court of Appeals refused to confer standing based on speculation (*Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976); *Warth v. Seldin*, 422 U.S. 490, 507 (1975)), or upon Petitioners' contentions that the hiring practices are unlawful (*Warth v. Seldin, supra*, 422 U.S. at 500). The intervention of numerous independent decisions and decisionmakers breaks any assertion of causality and defeats a claim of standing. *Allen v. Wright, supra*, 468 U.S. at 746, 759; *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 40-43, 45.

As in these cases, the Court of Appeals correctly found in the instant case no "fairly traceable" connection between the challenged hiring practices and any harm to the Petitioners' speech and associational rights as candidates and voters. (20a-21a) Too many factors, decisions and decisionmakers intervene. Petitioners' claim truly rests upon their speculation as to what uncounted and unidentified political contributors and workers, voters, and job applicants will choose to do, in infinitely variable situations, and what impact, if any, it will have.

Petitioners' suggestion in a footnote that these decisions are not independent, because "patronage employees and applicants" are "required" to provide political support, is a plain misstatement, correction of which utterly defeats

their argument. Political work, or support, or contributions, cannot be required of employees. Petitioners ignore both the consent decree and this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Moreover, no prospective job applicant is required to do anything. It is just those independent assessments and decisions cited by the Court of Appeals which any such prospective applicant must make in determining whether or not he or she wishes to give any candidate political support, or wants to seek employment at some job in the office of some elected official.[4] Petitioners' attempt to diminish the analysis of the Court of Appeals is thus without merit.

Thus far, the only decision from a Court of Appeals on a similar issue is *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), which found that the plaintiff candidates and voters had no standing to challenge various practices of the incumbent President of the United States, which they claimed infringed their rights to an equal chance in

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[4] Moreover, that decisionmaking is not based on the prospect of any total exclusion from public employment, as Petitioners imply. At the time of submission of the summary judgment evidence, there were about 20,000 jobs (most of which, of course, are occupied by incumbents at any given time) to which the hiring practices were said to be applicable, while Cook County, Chicago and the Chicago Park District employed a total of about 58,000, or 118,000 employees, if the Chicago Board of Education and (then called) Chicago Transit Authority were included. Since then, groups of employees have, through statutory or other changes become "merit" or civil service employees. *See, i.e.*, Ill. Rev. Stat. 1985, ch. 125, §§56, 58, effective July 1, 1984, bringing Cook County Sheriff's Deputies ("full time deputy Sheriffs") under the Cook County Sheriff's Merit Board. Thus, most of the jobs in geographical Cook County are not even involved in the challenged hiring practices. It is also a fact that all elected offices are not held simultaneously by members of the same political party, let alone the same faction of any party.

their support of the candidacy of Edward Kennedy. *Winpisinger* included a challenge to the "grant[ing] and withhold[ing of] public employment based upon political support by the employee." 628 F.2d at 135. A single "example" given by the Court is the hiring of 275,000 persons to take the census. 628 F.2d at 136. The practice of this political hiring, even coupled with all of the other listed practices, was still held to be only remotely and speculatively connected to any harm to, or dilution of, the plaintiff candidates' and voters' First and Fifth Amendment rights. The Court specifically distinguished both *Baker v. Carr*, 369 U.S. 186 (1962), and *Elrod v. Burns*, 427 U.S. 347 (1976), because they involved "direct tangible injury." 628 F.2d at 138.

The Court of Appeals agreed with *Winpisinger*, finding it instructive in:

> assessing whether the plaintiffs have demonstrated the requisite causality between their alleged injury and the actions of a political incumbent. It is no easier to measure the effect of an incumbent's promises on the ebb and flow of the political tide in Cook County, Illinois, than it is in any other political context. (23a)

Thus the decision in this case is consistent, not only with the opinions of this Court, but with the only other Circuit to consider the question.[5]

Other decisions of this Court further refute the Petitioners' claims of injury. In *Buckley v. Valeo*, 424 U.S. 1 (1976), which Petitioners cite (Pet. at 19), this Court

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[5] The District Court also dismissed claims of voters based on lack of standing in *Rutan v. Republican Party of Illinois*, 641 F. Supp. 249, 256 (C.D. Ill. 1986) (appeal pending), a case challenging, *inter alia*, hiring practices.

found that the First and Fifth Amendment rights of the plaintiffs were not harmed even by statutes which explicitly denied funding to small political parties. If the funding of some parties with significant support, but not minority parties, was not held to be an impediment to the chances of the minority parties in *Buckley, supra,* then the suggestion that the challenged hiring practices are an impediment is even more untenable. The connection between the practices of officials and the rights of the plaintiffs in *Buckley* was clear and direct compared to that in the instant case.

Moreover, in *Laird v. Tatum,* 408 U.S. 1 (1972), this Court held that the petitioners, who were challenging a government surveillance system, had no standing. Their assertion of the chilling of their First Amendment rights by virtue of knowledge of governmental activities was insufficient to confer standing. 408 U.S. at 11. Likewise, the Petitioner candidates and voters in the instant case, who assert a "chilling" of their First Amendment rights, have not and cannot demonstrate that they have been harmed, a prerequisite, indeed the *sine qua non,* of standing.

Petitioners rely upon a truly inapposite case, *Tashjian v. Republican Party,* ____ U.S. ____, 107 S.Ct. 544 (1986), in support of the obvious proposition that voters can "challenge state burdens" on association. (Pet. at 19) In *Tashjian,* however, the statute in question directly and absolutely prohibited persons not affiliated with a political party from voting in that party's primary election. Even with such a direct burden on the electoral process and the rights of voters to vote for whomever they chose, the decision was five to four.

In the instant case, however, no aspect of the electoral process is challenged, and no voter is prohibited from

voting for any candidate, as the Court of Appeals emphasized. (17a-18a) Consequently, *Tashjian*, which was not a standing case, is instructive only as to what may constitute a direct and fairly traceable injury in the electoral process. By comparison, moreover, it demonstrates the utterly speculative nature of Petitioners' claims as to the political process.

Petitioners attempt to somehow buttress their argument by quoting a passage criticizing patronage practices from *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). *Lewis*, however, involved discharges, demotions, and other adverse actions against employees. Its comment, moreover, must be viewed in the context of the early 1970's, a situation which after this Court's subsequent decisions in *Elrod* and *Branti*, *supra*, no longer exists. *Lewis* anticipated those decisions.

Petitioners also erroneously assert that the decision in the instant case would "preclude judicial review of the effect of any system of patronage hiring on the rights of candidates and voters." (Pet. at 18) The Court of Appeals, however, expressly noted that it did not address the question of the standing of candidates and voters to challenge political coercion of employees. (23a, n. 14) Furthermore, Petitioners' speculation as to whether any unidentified candidates and voters can successfully challenge some unspecified hiring practices by asserting some fairly traceable injury must remain unresolved at this time.

Likewise, Petitioners' conjecture that the instant decision "would expand the standing requirement to establish a significant barrier to consideration of" some again unidentified "wide range of state practices concerning the electoral process" (Pet. at 19) is unwarranted. This case

involves not the electoral process but the political process. Petitioners' claim of standing must be based on more than speculation or their vague hypotheses as to the guessed effect on some unidentified practices. The Court of Appeals decision would no more block judicial consideration of appropriate cases and controversies than this Court's earlier decisions blocked consideration of *Tashjian v. Republican Party, supra,* that is, not at all.

Finally, Petitioners lift out of context the Court of Appeals statement that the challenged hiring practices do not "completely restrict" political support. (Pet. at 19) No intimation is even hinted, as Petitioners would have this Court believe, that any restriction short of a complete one is insufficient to confer standing. In fact, the Court of Appeals only referred in passing to the lack of any complete restriction, on its way to a description of the nature of the claim that the hiring practices conferred an advantage. (18a)

This Court has aptly stated:

> Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing "focuses on the party seeking to get his complaint before the federal court and not on the issue which he wishes to have adjudicated." [citation omitted] *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 37-38.

Petitioners have utterly failed to demonstrate either that as candidates and voters they can assert any injury fairly traceable to the challenged hiring practices, or that the Court of Appeals decision is in any way inconsistent with the decisions of this Court.

II.

THE COURT OF APPEALS DID NOT REACH THE QUESTION OF THE CONSTITUTIONALITY OF THE HIRING PRACTICES, AND PETITIONERS HAVE NOT ASSERTED ANY BASIS FOR THIS COURT TO REVIEW THE MERITS OF THEIR CLAIM.

The Petition, which dwells on the alleged importance of the question, scarcely suggests that the Court of Appeals did not reach the issue of the constitutionality of the challenged hiring practices. Respondents not only disagree with Petitioners' evaluation, but maintain that neither the merits nor importance of an issue confers standing or warrants granting a writ of certiorari when Petitioners lack standing.

As demonstrated, *supra*, these Petitioners, who are a class of candidates and voters, cannot bootstrap a claim of standing by simply asserting the importance of an issue, or arguing their opinion of the alleged merits of their claim. The Court of Appeals correctly held that standing does not depend upon the merits of the contention of illegality. (15a) *See, Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Furthermore, Petitioners' argument that their rights are infringed depends not only upon their erroneous insistence that the 1969 world is unchanged, but also upon their characterization of their claims, and the challenged hiring practices, as part of the "electoral system." In fact, their claim relates to the political process. As the Court of Appeals aptly emphasized:

> Indeed, this case is not really a challenge to the mechanics of an electoral system at all. We are not asked to evaluate any aspect of the electoral process—the procedure to get on the ballot or to obtain a place on the ballot. (17a-18a)

Petitioners as candidates do not assert deprivation of the opportunity to run for office, or appear on the ballot, or be placed on the ballot in a particular manner. Petitioners as voters do not claim deprivation of an opportunity to vote for a particular candidate. They do not suggest complete restriction of speech and associational rights, but claim that they are disadvantaged. (18a) Indeed, any claim at all is of an indirect (18a) and "particularly attenuated" nature (20a). Petitioners attempt to avoid nearly two decades of progress and current political reality in Cook County by focusing on the allegations of the 1969 complaint (Petition, generally), allegedly supported by some academic research published in 1972 and 1974.[6] (Pet. at 16) As addressed in the Statement of the Case, *supra*, however, the "extensive" practices alleged by the 1969 Complaint are no longer at issue. Their elimination by the 1972 consent decree (5a, 11a-12a), has been reinforced and assured by this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976),[7] and *Branti v. Finkel*, 445 U.S. 507 (1980).

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[6] Several more recent studies have reached the opposite conclusion. J. Moeller, "The Supreme Court's Quest for Fair Politics, 1 Const. Commentary 203 (1984), states that "incumbents may have an unfair advantage and politics may be unfair, but it does not follow that therefore patronage is unconstitutional", and furthermore, "[t]o suggest that all influence can be removed—or should be removed—is to propose a dream world devoid of politics." *Id.* at 216; *See Also*, Johnson, *Political Corruption and Public Policy in America*, 61 (1982), cited in *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983).

[7] Of course, at the time *Elrod v. Burns* was before this Court, the then Sheriff of Cook County was one of the two non-consenting defendants regarding politically based actions affecting incumbent employees. They too, however, subsequently entered into a consent judgment.

Moreover, Petitioners, who lack standing as candidates and voters to assert the alleged rights of job applicants or employees, apparently would ask this Court to now hold that the rights of those groups are similar. This Court has never so held, and in fact its opinions distinguish between the interests involved in discharge or layoff cases, and those relating to hiring, even where affirmative action is involved. *Wygant v. Jackson Board of Education*, ____ U.S. ____, 106 S.Ct. 1842, 1851 (1986) (Powell, J., plurality opinion.).

The only Court of Appeals case considering a challenge to hiring practices by voters and candidates held that the plaintiffs had no standing. *Winpisinger v. Watson, supra*, 628 F.2d 133 (D.C. Cir. 1980). Each Court of Appeals to reach the question of the rights of applicants for either government jobs or contracts, where political factors are a basis for consideration, has refused to hold that such practices are unconstitutional.[8] *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), *cert. denied*, 106 S. Ct. 3276 (1986); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982); *Fox v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982).

Several district courts which have considered the question have, like the Courts of Appeals, refused to extend this Court's analysis in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to hir-

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[8] *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977), *cert. denied*, 494 U.S. 892 (1977), cited by Petitioners (Pet. at 12-13, n. 5) was a discharge case, and consequently its statement as to hiring was *dictum*. The Court in *Mazus v. Department of Transportation*, 629 F.2d 870 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), did not need to reach the constitutional question in the case before it, but noted that the *Rosenthal* Court's statement was not binding.

ing cases. *See, Messer v. Curci*, 610 F. Supp. 179 (E.D. Ky. 1985) (appeal pending); *Rutan v. Republican Party*, 641 F. Supp. 249 (C.D. Ill. 1986) (appeal pending). In *Rutan*, the court dismissed not only the claims of job applicants and employees, but also those of voters.

The two district courts to suggest that politically based hiring practices are unconstitutional rely, incorrectly, on the application of *Elrod v. Burns* and *Branti v. Finkel* to hiring practices. *See, Torres v. Grunkmeyer*, 601 F. Supp. 1043 (D. Wyo. 1984), and *Indiana State Employees Association v. Indiana Republican State Central Committee*, 630 F. Supp. 1194 (S.D. Ind. 1986).[9] Even Petitioners in the instant case concede that the holdings of *Elrod* and *Branti* "were limited to the legality of political discharges." (Pet. at 11-12)

If claims of politically based hiring practices cannot support a job applicant's cause of action, they manifestly do not support the eminently more remote and attenuated claims of candidates and voters. Contrary to Petitioners' contentions, neither this case nor this issue is of serious consequence to millions of voters across the nation. Judicial intervention is manifestly not warranted in such purely political matters.

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[9] In two other cases, the issue was not reached. In *Gomez v. South Bend*, 605 F. Supp. 1173 (N.D. Ind. 1985), cited by Petitioners (Pet. at 13, n. 5) the Court assumed for the sake of argument that a claim of a hiring decision based on political neutrality could support a cause of action, and then found that the plaintiff had not even shown any such motivating factor. In *Cullen v. New York Civil Service Commission*, 435 F. Supp. 546 (E.D. N.Y.) appeal dismissed, 566 F.2d 846 (2nd Cir. 1977), also cited by Petitioners in footnote 5, the Court merely held that civil service jobs could not be conditioned upon political contributions.

Petitioners' argument begs the question of the impact upon them of the challenged hiring practices, and erroneously presumes not only coercion, but the alleged "extensive" nature of the hiring practices. All three of these bases for Petitioners' argument are utterly negated by the consent decree regarding, *inter alia*, politically motivated discharges. As a result of that decree, the combined impact of political hiring and firing practices, which comprised a substantial portion of the original case, and upon which Petitioners now depend, is simply no longer at issue.

CONCLUSION

For the foregoing reasons, Respondents pray that the Writ be denied.

Respectfully submitted,

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